MOTION FILED
DEC 19 1977

No. 76-1471
(Consolidated With Nos. 76-1521, 76-1595, 76-1604, 76-1624 and 76-1685)

IN THE

Supreme Court of the United States

October Term, 1977

FEDERAL COMMUNICATIONS COMMISSION,

Petitioner,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF NATIONAL EMERGENCY CIVIL LIBERTIES FOUNDATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, AND BRIEF *AMICUS CURIAE*

ERIC M. LIEBERMAN
Rabinowitz Boudin & Standard
30 East 42nd Street
New York, New York 10017

Attorney for Amicus Curiae

December 1977

INDEX

PAGE

Interest of *Amicus* 5

Opinions Below 6

Question Presented 6

Statement of the Case 6

ARGUMENT—

I. The Commission's Policy of Assuring Diversity of Ownership and Management in Granting Broadcast Licenses Is a Constitutional Imperative in Light of the Suspect Constitutionality of the System of Exclusive Licensing of Speakers and the Press Effected by the Federal Communications Act. Departures From That Policy Accordingly Must Be Narrowly Drawn and in Furtherance of a Compelling Countervailing Government Interest 9

II. The Commission's Constitutionally Mandated Diversification Policy Properly Extends to Insuring That Broadcast Stations Are Not Owned or Controlled by Individuals Who Also Own or Control Daily Newspapers of General Circulation Located in the Same Community. The Commission Failed to Identify a Compelling Government Interest to Justify Its Refusal to Require Divestiture of Existing Cross-Owned Newspaper-Broadcast Station Groups 19

CONCLUSION 24

Table of Authorities

Cases: PAGE

Abrams v. *United States*, 250 U.S. 616 12
Associated Press v. *United States*, 326 U.S. 1 20

Baird v. *Arizona*, 401 U.S. 1 17
Banzhaf v. *FCC*, 405 F.2d 1082 (D. C. Cir. 1968), *cert. denied*, 396 U.S. 842 9
Brandenburg v. *Ohio*, 395 U.S. 444 17
Brandywine-Main Line Radio v. *FCC*, 473 F.2d 16 (D. C. Cir. 1972), *cert. denied*, 421 U.S. 922 9

Cantwell v. *Connecticut*, 310 U.S. 296 11
Citizens Committee to Save WEFM v. *FCC*, 506 F.2d 246 (D. C. Cir. 1974) 9
Citizens Communications Center v. *FCC*, 447 F.2d 1201 (D. C. Cir. 1971) 9
Clarksburg Publishing Co. v. *FCC*, 225 F.2d 511 (D. C. Cir. 1955) 17, 22
Cohen v. *California*, 403 U.S. 15 11
Columbia Broadcasting System v. *Democratic National Committee*, 412 U.S. 94 9
Cox v. *New Hampshire*, 312 U.S. 569 11
Cox v. *Louisiana*, 379 U.S. 536 11

Federal Radio Commission v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 11

Greater Boston Television Corp. v. *FCC*, 444 F.2d 841 (D. C. Cir. 1970), *cert. denied*, 403 U.S. 923 9

Hale v. *FCC*, 425 F.2d 556 (D. C. Cir. 1970) 24

Keyishian v. *Board of Regents*, 385 U.S. 589 ..... 12, 17
Kunz v. *New York*, 340 U.S. 290 11

PAGE

Lamont v. *Postmaster General*, 381 U.S. 301 12
Lovell v. *Griffin*, 303 U.S. 444 11

Martin v. *City of Struthers*, 319 U.S. 141 12
Mt. Mansfield Television, Inc. v. *FCC*, 442 F.2d 470 (2d Cir. 1971) 9

National Broadcasting Co. v. *United States*, 319 U.S. 190 ..... 11, 13, 15
National Citizens Committee for Broadcasting v. *FCC*, —— F.2d ——, No. 74-1700 (D. C. Cir.) (Nov. 11, 1977) 9
New York Times Co. v. *Sullivan*, 376 U.S. 254 12

O'Brien v. *United States*, 391 U.S. 367 11

Red Lion Broadcasting Co., Inc. v. *FCC*, 395 U.S. 367 ..... *passim*

Schneider v. *Smith*, 390 U.S. 17 12
Schneider v. *State*, 308 U.S. 147 11
Scripps-Howard Radio, Inc. v. *FCC*, 189 F.2d 677 (D. C. Cir. 1951) 17, 22
Shelton v. *Tucker*, 364 U.S. 479 ..... 11, 12, 17
Shuttlesworth v. *Birmingham*, 394 U.S. 147 11
Southeastern Promotion Ltd. v. *Conrad*, 420 U.S. 546 11
Staub v. *City of Baxley*, 355 U.S. 313 11

Tinker v. *Des Moines Board of Education*, 393 U.S. 503 11

United States v. *Storer Broadcasting Co.*, 351 U.S. 192 ..... 16, 17
United States v. *Zenith Radio Corp.*, 12 F.2d 614 (N. D. Ill. 1926) 13

PAGE

Whitney v. *California*, 274 U.S. 357 12

Agency Decisions:

Amendment of the Multiple Ownership Rules (Docket No. 8967), 18 Fed. Reg. 7796 (1953), 18 F.C.C. 299 (1953) 16

Duopoly Rules, 5 Fed. Reg. 2282 (1941), 8 Fed. Reg. 16065 (1943) 16

In re National Broadcasting Co., 19 F.C.C. 2d 713 23

Multiple Ownership Rules (Docket No. 18110):

Notice of Proposed Rulemaking, 33 Fed. Reg. 5315 (1968) 6

First Report and Order, 22 F.C.C. 2d 306 (1970) 7, 16, 23

Further Notice of Proposed Rulemaking, 22 F.C.C. 2d 339 (1970) 7, 20

Second Report and Order, 50 F.C.C. 2d 1046 (1975) ..... *passim*

Newspaper Ownership of Radio Stations, 9 Fed. Reg. 702 (1944) 22

Northeastern Indiana Broadcasting Co., 9 R. R. 261 (1953) 22

Order No. 79-A, 6 Fed. Reg. 3302 (July 8, 1941) 21

Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393 (1965) 17

Report on Chain Broadcasting (Order No. 37, Docket No. 5060) (1941) 15

Constitutional Provisions: PAGE

First Amendment ..... *passim*

Statutes:

Federal Communications Act of 1934, 47 U.S.C. § 151, *et seq.* ..... *passim*

§ 303 14
§ 303(r) 14
§ 307 14
§ 307(a) 14
§ 307(d) 24
§ 309(a) 14
§ 309(h) 14, 24

Federal Radio Act of 1927, 44 Stat. 1163 10

Miscellaneous Authorities:

47 CFR §§ 73.123, 73.300, 73-598, 73-679 14

35 Op. Atty. Gen. 126 (1926) 13

Roper, *A Ten-Year View of Public Attitudes Toward Television and Other Media: 1959-1968* (1969) 20

Steiner, *The People Look at Television* (1963) 20

IN THE

Supreme Court of the United States

October Term, 1977

No. 76-1471

FEDERAL COMMUNICATIONS COMMISSION,

Petitioner,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF NATIONAL EMERGENCY CIVIL LIBERTIES FOUNDATION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*

Pursuant to Rule 42(3) of the rules of the Court, the National Emergency Civil Liberties Foundation moves for leave to file a brief *amicus curiae* in the above-entitled case and in the cases consolidated with it. The attorneys for the petitioner and the respondent in the above-entitled case and in case Nos. 76-1624[1] and 76-1685[2] have consented to

---

[1] *Illinois Broadcasting Company, Inc.* v. *National Citizens Committee for Broadcasting.*

[2] *Post Company* v. *National Citizens Committee for Broadcasting.*

the filing of the attached brief.[3] The attorneys for the petitioners in case Nos. 76-1604[4] and 76-1595[5] refused consent. The attorney for the petitioner in case No. 76-1521[6] failed to respond to a request for consent.

The National Emergency Civil Liberties Foundation, Inc. (NECLF) is a not-for-profit public foundation organized to protect and defend the rights and liberties guaranteed by the Constitution and the Bill of Rights. The Foundation was established in 1971 to continue and expand the similar work of the National Emergency Civil Liberties Committee (NECLC), which was founded in 1951. Attorneys for NECLF and NECLC have appeared in numerous cases before this Court, the lower federal courts and federal administrative agencies in defense of the rights of freedom of speech and the press and of the public's right to access to information from diverse and antagonistic sources.

The National Emergency Civil Liberties Foundation has become increasingly concerned with issues involving the role of the broadcast media, particularly television, in modern society. Television at once presents the greatest

[3] The letters of consent have been lodged with the Clerk of the Court.

[4] *American Newspaper Publishers Association* v. *National Citizens Committee for Broadcasting.*

[5] *National Association of Broadcasters* v. *Federal Communications Commission.*

[6] *Channel Two Television Company* v. *National Citizens Committee for Broadcasting.*

potential of all media for the furtherance of the goals and policies of the First Amendment, and also the greatest potential for abuse, manipulation and destruction of those goals and values.

Accordingly, attorneys for the Foundation represented the Socialist Workers Party before the Federal Communications Commission, the United States Courts of Appeals for the Second and District of Columbia Circuits, and this Court in proceedings in 1976 arising from the Party's efforts to enforce Section 315 of the Federal Communications Act. See *Socialist Workers Party* v. *Federal Communications Commission,* petition for writ of certiorari, October Term 1976, No. 76-470. More recently, the Foundation filed lengthy comments with the Federal Communications Commission in the Commission's inquiry into *Commercial Television Network Practices and the Ability of Station Licensees to Serve the Public Interest,* Docket No. 21049 (1977). And the Foundation has submitted proposals to the Communications Subcommittee of the House of Representatives Committee on Interstate and Foreign Commerce, which is the process of an exhaustive reexamination of the premises and structure of the Federal Communications Act.

The present case raises the issue of whether one of the few broadcast television licenses in a given community should be granted or renewed to a licensee who also owns and publishes a daily newspaper of general circulation in the same community. The question is a complex one which involves construction of the "public interest" standard of the Federal Communications Act and of the First Amendment. Critical constitutional questions are involved. We

believe that our brief will be of substantial assistance to the Court.

Respectfully submitted,

ERIC M. LIEBERMAN
Attorney for Movant

December 1977

IN THE

Supreme Court of the United States

October Term, 1977

No. 76-1471

FEDERAL COMMUNICATIONS COMMISSION,

Petitioner,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF NATIONAL EMERGENCY CIVIL LIBERTIES FOUNDATION, *AMICUS CURIAE*

The National Emergency Civil Liberties Foundation, as *Amicus Curiae,* urges the Court to affirm the judgment of the United States Court of Appeals for the District of Columbia Circuit for the reasons set forth in this Brief and in the opinion below of the court of appeals.

Interest of *Amicus*

The interest of *Amicus* is stated in the Motion for Leave to File, *ante.*

Opinions Below

The opinion of the court of appeals (App. 339)[1] is reported at 555 F.2d 938. The order granting in part the Commission's motion for stay of mandate (App. 435) is reported at 555 F.2d 967. The orders of the Commission (App. 134, 317) are reported at 50 F.C.C. 2d 1046 and 53 F.C.C. 2d 589.

Question Presented

Whether, in the absence of a countervailing compelling public interest, the Federal Communications Commission was required, pursuant to the First Amendment and the "public interest" standard of the Federal Communications Act, to order divestiture of existing combinations of cross-owned newspaper-broadcast station groups in the same community, subject to applications for waiver in exigent circumstances?

Statement of the Case

On March 27, 1968, the Federal Communications Commission invited comments on proposed rules which would limit a broadcast licensee to one broadcast station of any kind (either AM or FM radio or television) in the same market. *Notice of Proposed Rulemaking*, 33 Fed. Reg. 5315 (Docket No. 18110). The Notice stressed that the Commission's purpose was "to promote maximum diversification of programming sources and viewpoints." The Commission did not propose rules affecting common ownership of broadcast stations and daily newspapers.

[1] References to "App." are to pages in the joint appendix filed by the parties.

In 1970 the Commission issued its *First Report and Order*, 22 F.C.C. 2d 306 (App. 33) in which it adopted the proposed rules. On the same day, in response to suggestions of the respondent herein and the Justice Department, the Commission issued a *Further Notice of Proposed Rulemaking*, 22 F.C.C. 2d 339, in which it proposed to require divestiture within five years of all existing newspaper-broadcast or television-radio combinations in the same market. Future creation of such combinations also would be prohibited. In support of its proposed rules, the Commission stated:

> In view of the primary position of the daily newspaper of general circulation and the television broadcast station as sources of news and other information, and discussion of public affairs, particularly with respect to local matters, it is not desirable that these two organs of mass communication should be under the same control in any community. A direct parallel would be the ownership of two television stations in the same community by the same person, which the Commission, without substantial disagreement from any source, has never permitted. The functions of newspapers and television stations as journalists are so similar that their joint ownership is, in this respect, essentially the same as the joint ownership of two television stations.

22 F.C.C. 2d at 346 (App. 115).

Following issuance of the *Further Notice*, the Commission deferred to the rulemaking all pending and future license renewal challenges alleging undue concentration involving newspaper-television cross-ownership. It renewed such licenses until determination of the rulemaking proceeding.

On January 31, 1975 the Commission issued its *Second Report and Order*, 50 F.C.C. 2d 1046 (App. 134), ter-

minating the proceeding. The Commission adopted a prospective rule banning new newspaper-broadcast cross-ownerships, whether created by an initial application and construction or by acquisition. It did so in furtherance of its long-standing policy, rooted in the First Amendment, of encouraging diversification of media voices in granting broadcast licenses.

The Commission declined, however, to order divestiture of existing newspaper-broadcast station combinations except in a small number of "egregious" (small-market absolute monopoly) combinations. The Commission stated that divestiture is a "harsh remedy" and would not be required absent a showing that "the need is overwhelming and the evidence unambiguous." 50 F.C.C. 2d at 1083 (App. 207). Commissioners Hooks and Robinson dissented in part on the divestiture question.

The court of appeals affirmed the Commission's rules imposing a prospective cross-ownership ban, but vacated that part of the Commission's order which failed to order divestiture except in "egregious" monopoly situations. The court held that the Commission properly could determine, as it did, that it is in the public interest to prohibit newspaper—broadcast cross-ownership in the same locality in furtherance of its longstanding policy of encouraging diversity of media voices. The court further held that departure from that diversification policy must be justified by rational and compelling countervailing public interests. The court found that the Commission improperly had reversed the presumption in favor of its diversification policy by refusing to order divestiture in the absence of a showing of overwhelming need. Finally, the court reviewed the reasons given by the Commission for declining to order divestiture and held that they did not meet the burden necessary to justify departure from the Commission's

diversification policy. It remanded the record so that the Commission could promulgate a rule on the issue after applying the proper rule of law.

ARGUMENT

I.

The Commission's Policy of Assuring Diversity of Ownership and Management in Granting Broadcast Licenses Is a Constitutional Imperative in Light of the Suspect Constitutionality of the System of Exclusive Licensing of Speakers and the Press Effected by the Federal Communications Act. Departures From That Policy Accordingly Must Be Narrowly Drawn and in Furtherance of a Compelling Countervailing Government Interest.

Once again the Court is called upon to resolve difficult issues arising out of the administration of the Federal Communications Act of 1934, 47 U.S.C. § 151, *et seq.* *Cf.*, *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission*, 395 U.S. 367; *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94. The single outstanding feature of each of these cases, and of a host of similar cases decided by the federal courts of appeals,[2] is that they involve the question of who will be allowed to

---

[2] See, *e.g.*, *Mt. Mansfield Television, Inc.* v. *Federal Communications Commission*, 442 F.2d 470 (2d Cir. 1971); *Brandywine-Main Line Radio* v. *Federal Communications Commission*, 473 F.2d 16 (D. C. Cir. 1972), *cert. denied*, 421 U.S. 922; *Citizens Committee to Save WEFM* v. *Federal Communications Commission*, 506 F.2d 246 (D. C. Cir. 1974); *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841 (D. C. Cir. 1970), *cert. denied*, 403 U.S. 923; *Banzhaf* v. *FCC*, 405 F.2d 1082 (D. C. Cir. 1968), *cert. denied*, 396 U.S. 842; *Citizens Communications Center* v. *FCC*, 447 F.2d 1201 (D. C. Cir. 1971); *National Citizens Committee for Broadcasting* v. *FCC*, —— F.2d ——, No. 74-1700 (D. C. Cir.) (Nov. 11, 1977).

"speak" in the forum of over-the-air broadcasting and who will be foreclosed from speaking. That such questions are entrusted at all to a government agency is quite remarkable in a constitutional system with a First Amendment which proclaims that "Congress shall make no law abridging the freedom of speech, or of the press . . . ." The fact that such questions do arise persistently is a result of choices made by Congress when it enacted the Federal Radio Act of 1927, 44 Stat. 1163, and the Federal Communications Act of 1934, *supra*. Resolution of such questions, and, in particular, resolution of the newspaper-broadcast station cross-ownership issue, must begin with analysis of the unique and constitutionally suspect choices Congress made in enacting the Federal Communications Act.

The basic fact about the Federal Communications Act is that it does exactly what the First Amendment states Congress may not do: it abridges the freedom of speech and of the press. By creating a system of exclusive licenses for operation of broadcast frequencies, the Act empowers the Commission to decide who may speak and who may not. A non-licensee is totally precluded from use of the broadcast media unless he can persuade a licensee to allow him access to use the broadcast facilities.

Such a system of exclusive licensing ordinarily is anathema to the regime established by the First Amendment:

> The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his "Appeal for the Liberty of Unlicensed Printing." And the liberty of the press became initially a right to publish *"without* a license what formerly could be published only *with* one." [Wickwar, *The Struggle for the Freedom of the Press* 15.]

Lovell v. *Griffin*, 303 U.S. 444, 451. See also *Kunz* v. *New York*, 340 U.S. 290; *Staub* v. *City of Baxley*, 355 U.S. 313; *Shuttlesworth* v. *Birmingham*, 394 U.S. 147. Certainly the government would be precluded from permitting, by license or otherwise, selected members of the public to speak at a public forum, park, or auditorium to the exclusion of all other members of the public. *Shuttlesworth* v. *Birmingham, supra*; *Southeastern Promotion, Ltd.* v. *Conrad*, 420 U.S. 546; *Cox* v. *Louisiana*, 379 U.S. 536. While the government may regulate the time, place and perhaps manner[3] of public speech in furtherance of a compelling interest, such as to prevent disruption of the peace or to assure that many speakers do not attempt to use the same forum simultaneously, it must do so in a neutral fashion without favoring one speaker over others. *Cox* v. *New Hampshire*, 312 U.S. 569; *Cox* v. *Louisiana, supra*; *Shuttlesworth* v. *Birmingham, supra*. Additionally, government regulation must be narrowly drawn so as to have the least restrictive impact on public speech. *Schneider* v. *State*, 308 U.S. 147; *Cantwell* v. *Connecticut*, 310 U.S. 296; *Shelton* v. *Tucker*, 364 U.S. 479.

The historic rationale for granting exclusive broadcast licenses was that the broadcast frequency spectrum is limited, and it was necessary for the government to impose a licensing system to prevent competing broadcasters from rendering the spectrum unusable. *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266; *National Broadcasting Co.* v. *United States*, 319 U.S. 190.

---

[3] The permissibility of restrictions upon the "manner" of speech restrictions is constitutionally questionable, given the Court's growing recognition that the manner of speech often is inextricably intertwined with its content, so that to restrict the manner is to censor the impact of the message. See *Tinker* v. *Des Moines Board of Education*, 393 U.S. 503; *Cohen* v. *California*, 403 U.S. 15. But see *O'Brien* v. *United States*, 391 U.S. 367.

> Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard. Consequently, the Federal Radio Commission was established to allocate frequencies among competing applicants in a manner responsive to the public "convenience, interest or necessity."

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. at 375-377.

The flaw in the rationale is that it accepted the system of exclusive licensing as the only solution to the problem of scarcity of frequencies, without considering other resolutions which would not have trenched so heavily on the First Amendment rights of non-licensees to speak and of the public to have access to diverse sources of information, speech and press coverage.[4] While the need for *some* solution to the problem was obvious—and "compelling" in terms of First Amendment analysis—no effort was made to tailor Congress' interference with First Amendment rights to the narrowest possible scope to achieve that purpose. See *Shelton* v. *Tucker*, 364 U.S. 479, 488; *Schneider* v. *Smith*, 390 U.S. 17, 24; *Keyishian* v. *Board of Regents*, 385 U.S. 589.

Congress certainly was aware of less restrictive alternatives to the one adopted. For example, licenses could have

[4] See *Abrams* v. *United States*, 250 U.S. 616, 630 (Holmes, J., dissenting); *Whitney* v. *California*, 274 U.S. 357, 375-376 (Brandeis, J., concurring); *Martin* v. *City of Struthers*, 319 U.S. 141, 143; *Lamont* v. *Postmaster General*, 381 U.S. 301; *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270.

been granted for the establishment of broadcast stations on a common carrier basis, with the facilities open to all. Such a system would not have barred anyone from the right of access to the broadcast media, and would have regulated access in a neutral "time and place" manner.

Still another alternative remedy actually was attempted during the mid-1920s, before Congress adopted the present licensing system when it enacted the Radio Act of 1927, *supra*. The Secretary of Commerce sought to deal with the scarcity problem "by limiting the power and hours of operation of stations in order that several stations might use the same channel." *National Broadcasting Co.* v. *United States*, 319 U.S. at 211. The effort failed when the courts and the Attorney General held that the Secretary lacked the statutory power to do so. *United States* v. *Zenith Radio Corp.*, 12 F.2d 614 (N. D. Ill. 1926); 35 Op. Atty. Gen. 126 (1926). The use of this alternative was opposed successfully by the already established radio interests when Congress considered proposals which lead to the enactment of the Radio Act of 1927. See *National Broadcasting Co.* v. *United States*, 319 U.S. at 211.

Congress, of course, rejected the alternatives suggested above, each of which would have abridged First Amendment rights to a much lesser extent than the exclusive licensing system actually established. The Court never has considered the question whether Congress' rejection of such alternatives was permissible, particularly in light of the relatively recent development of the First Amendment doctrines of "less restrictive alternatives" and "overbreadth."[5] In *Red Lion*, however, the Court suggested that the development and expansion of FCC policies designed to pro-

[5] The question, of course, is not raised directly in the present case and *Amicus* does not urge that it be reached here. It must be considered, however, as bearing directly on the resolution of the question here presented, as we argue in the text, *post*.

tect First Amendment "values" in furtherance of the "public interest" standard of the Communications Act,[6] such as the personal attack and political editorial rules[7] and the fairness doctrine,[8] served as substitutes for the less restrictive licensing alternatives and therefore might save the exclusive licensing system from constitutional invalidity.

> Rather than confer frequency monopolies on a relatively small number of licensees . . . the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week. The ruling and regulations at issue here do not go quite so far. They assert that under specified circumstances, a licensee must offer to make available a reasonable amount of broadcast time to those who have a different view from that which

[6] The Commission is authorized to promulgate "such rules and regulations and prescribe such restrictions and conditions" "as public convenience, interest or necessity requires." 47 U.S.C. § 303, 303(r). It must consider the demands of the public interest in the course of granting or denying licenses, 47 U.S.C. §§ 307(a), 309(a), renewing them, 47 U.S.C. § 307, and modifying them. *Id.* It must include among the conditions of the licenses it issues the requirement that operation of the station be carried out in the public interest. 47 U.S.C. § 309(h).

[7] 47 CFR §§ 73.123, 73.300, 73.598, 73.679.

[8] The history and content of the fairness doctrine is described in *Red Lion*, 395 U.S. at 377-379:

> There is a twofold duty laid down by the FCC's decisions and described by the 1949 Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). The broadcaster must give adequate coverage to public issues . . ., and coverage must be fair in that it accurately reflects the opposing views . . . . This must be done at the broadcaster's own expense if sponsorship is unavailable, . . . Moreover, the duty must be met by programming obtained at the licensee's own initiative if available from no other source.

Id. at 377-378 (citations omitted).

> already has been expressed on his station . . . As we have said, the First Amendment confers no right on licensees to prevent others from broadcasting on "their" frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use.
>
> • • •
>
> There is no sanctuary in the First Amendment for unlimited private censorship in a medium not open to all. "Freedom of the Press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. at 390-392.

The Court's insight in *Red Lion* was well-founded. Without the leavening effect of such doctrines as were at issue in *Red Lion*, the bald infringement of First Amendment rights effected by the Communications Act surely could not stand. And at least as necessary and important, and probably more so, as the fairness doctrine and the equal time and personal attack rules in providing constitutional support and sanction to the scheme of the Act is the Commission's policy of insuring that its licensees represent as many diverse speakers and points of view as can practically be achieved. It is this diversification policy which is at issue in the present case.

The diversification policy is of long-standing. In 1941 the Commission decided that it would not grant additional licenses to the NBC and CBS radio networks, and ordered that NBC divest one of its dual networks.[9] Between 1941 and 1943 the Commission adopted its "duopoly" rules bar-

[9] *Report on Chain Broadcasting*, Docket 5060 (1941), *affirmed*, *NBC* v. *United States*, 319 U.S. 190.

ring common ownership in the same community of two local broadcast stations of the same type, and requiring divestiture of commonly-owned AM stations.[10] In 1953 the Commission adopted rules specifying maximum numbers of TV, AM and FM stations which a single licensee can own or control on a national basis.[11] See the general discussion of these and other actions in the opinion of the court of appeals, 555 F.2d at 944-945 (App. 350-352).

In each of the actions described, the Commission and the courts, including this Court, justified the actions taken by the "public interest" standard of the Communications Act and as finding support in the First Amendment. As the Commission noted in its *First Report and Order* in the present proceeding:

> Basic to our form of government is the belief that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." (*Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).)
>
> • • •
>
> These principles, upon which Judge Learned Hand observed that we had staked our all, are the wellspring, together with a concomitant desire to prevent undue economic concentration, of the Commission's policy of diversifying control of the powerful medium of broadcasting. For centralization of control over the media of mass communications is, like monopolization of economic power, per se undesirable. The power to

[10] *Duopoly Rules*, 5 Fed. Reg. 2382 (1940), 6 Fed. Reg. 2282 (1941), 8 Fed. Reg. 16065 (1943).

[11] *Amendment of the Multiple Ownership Rules*, 18 Fed. Reg. 7796, 7797 (1953), 18 F.C.C. 288 (1953), *affirmed*, *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192.

> control what the public hears and sees over the airwaves matters, whatever the degree of self-restraint which may withhold its arbitrary use.

22 F.C.C. 2d 306, 310 (App. 40-41). See also *United States* v. *Storer Broadcasting Co., supra; Clarksburg Publishing Co.* v. *FCC*, 225 F.2d 511, 519 (D. C. Cir. 1955); *Scripps-Howard Radio, Inc.* v. *FCC*, 189 F.2d 677 (D. C. Cir. 1951); *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 394 (1965).

Indeed, the Commission recognized the constitutional imperative behind its diversification policy in its *Second Report and Order* in the present proceeding, where it said that its prime time access rules were "consistent with our *obligations* under the First Amendment to promote diversity of program sources." 50 F.C.C. 2d at 1049 (App. 140). Unfortunately, the Commission did not analyze the significance of its First Amendment obligations in refusing to require divestiture in the present case.

Once it is recognized that the diversification policy is constitutionally mandatory under the existing Communications Act, analysis of the issues raised in the present case becomes easier. A policy or action which increases the diversity of the mass communications media must be favored presumptively, and an opponent of such action must carry a heavy burden to justify departure from the general rule. For where First Amendment rights are at stake, they may be restricted only in furtherance of a compelling *government* interest. *Cf.*, *Keyishian* v. *Board of Regents, supra; Brandenburg* v. *Ohio*, 395 U.S. 444; *Shelton* v. *Tucker*, 364 U.S. 479; *Baird* v. *Arizona*, 401 U.S. 1. The same rule should apply when the Commission seeks to depart from a general policy which it consistently has found to be in the public interest.

Indeed, in this very proceeding the Commission determined that separate ownership of newspapers and television stations in the same area is markedly in the public interest.

> If our democratic society is to function, nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible. This is not a reflection on the efforts of combination owners in diligently serving the public interest. Rather, it is a recognition that it is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run.

50 F.C.C. 2d at 1079-1080 (App. 200).

The court of appeals held that the Commission was correct in its view that the "public interest" and the First Amendment support separate ownership. The court went on to hold, however, that the Commission failed to identify sufficient countervailing interests which compelled grandfathering of existing cross-owned combinations.

The court of appeals decision is attacked on several grounds. First, several parties urge that whatever power the Commission may have to pursue a diversification policy among broadcasters does not extend to a power to require diversification between broadcasters and newspaper owners. Second, the Commission and several parties supporting it assert that it was not required to order divestiture in furtherance of its general policy, which it applied prospectively, of seeking separate ownership of co-located newspapers and broadcast stations.

We treat of these issues briefly in the next section of the Brief. For full analysis of the inadequacy of the several grounds relied upon by the Commission for its departure from the diversification policy on the divestiture issue, we rely in major part upon the opinion of the court of appeals and the briefs filed by the respondent and the Solicitor General. *Amicus* emphasizes that in analyzing these questions it is essential to bear in mind the suspect constitutionality of the exclusive licensing system of the Communications Act, and the critical and essential role of a diversification policy in providing constitutional support and justification of that system, if indeed it can be justified and supported at all.

II.

The Commission's Constitutionally Mandated Diversification Policy Properly Extends to Insuring That Broadcast Stations Are Not Owned or Controlled by Individuals Who Also Own or Control Daily Newspapers of General Circulation Located in the Same Community. The Commission Failed to Identify a Compelling Government Interest to Justify Its Refusal to Require Divestiture of Existing Cross-Owned Newspaper-Broadcast Station Groups.

Several parties argue that the Commission may not extend its policy of assuring diversity of broadcast licensees to prohibit co-ownership of a newspaper and broadcast station in the same locality. This, it is argued, amounts to regulation of all mass media, whereas the Commission is empowered to regulate only broadcast media.

The simple answer is that in prohibiting cross-ownership the Commission neither intends to nor does regulate newspapers, *per se*, any more than it regulates other unsuccessful applicants for a license. The Commission necessarily must consider a host of factors in allocating licenses on a comparative basis in furtherance of the public interest.

Some factors are discretionary with the Commission. Others, such as the diversification policy, are constitutionally mandated. In considering to whom it will grant a license to speak, to the exclusion of other voices, the Commission not only may but must take into account whether or not the applicant for the license already has an effective means of reaching the public, particularly through another medium of mass communications. See *Associated Press* v. *United States*, 326 U.S. 1, 20. The possibility that denial of licenses to newspapers may indirectly affect the economics of publication does not provide newspapers with protection against such regulation in the public interest. *Id.*

Indeed the need for a cross-ownership rule is quite compelling, especially with respect to the newspaper-television question. The evidence is overwhelming that the public relies almost exclusively on these two sources for its news and information in public affairs. Roper, *A Ten-Year View of Public Attitudes Toward Television and Other Media: 1959-1968* (1969); *Further Notice of Proposed Rulemaking*, 22 F.C.C. 2d 339, 344 (App. 112); Steiner, *The People Look at Television* (1963). To permit significant concentration of control over these two media by one voice in a given locality, even short of monopoly, grossly exacerbates the abridgment of the freedom of speech and the press effected by the exclusive licensing system of the Communication Act.

Accordingly, the Commission long has been concerned with the problem of newspaper-broadcast joint control. In the early 1940's it announced an inquiry on the subject and stated its intent to determine:

> Whether joint association of newspapers and broadcast stations tend or may tend to. . . .
>
> • • •

> 2 . . . prejudice the free and fair presentation of public issues and information over the air, or to cause editorial bias or distortion, or to inject editorial policy or attitude into the public service rendered by broadcast stations as a medium of public communication.
>
> 3 . . . restrict or distort the broadcasting of news, or to limit the sources of news to the public, or to affect adversely the relation between news-gathering services and broadcast stations.
>
> 4 . . . have any effect upon freedom of access to the radio forum, for the discussion of public issues.
>
> 5 . . . lessen or increase competition among broadcast stations or to result in the monopolization of local broadcast facilities.
>
> • • •
>
> 7 . . . constitute an undue concentration of control over the principal media for public communication.

6 Fed Reg. 3302 (Order No. 79-A) (July 8, 1941).

Following the inquiry, the Commission concluded that the information gathered did not warrant a general rule barring newspaper ownership of radio stations at that time. Nevertheless, the Commission strongly stated its intentions to consider future potential newspaper-broadcast concentration issues on a case by case basis:

> [T]he Commission recognizes the serious problem involved in the broader field of the control of the media of mass communications and the importance of avoiding monopoly of the avenues of communicating fact and opinion to the public. All the Commissioners agree to the general principle that diversification of control of such media is desirable. . . . [*The Commission*] *does*

> ***not intend in granting licenses in the public interest to permit concentration of control in the hands of the few to the exclusion of the many who may be equally well qualified to render such public service as is required of a licensee.***

Newspaper Ownership of Radio Stations, 9 Fed. Reg. 702 (1944) (Emphasis added).

Since 1944, the courts and the Commission have held that newspaper-broadcast cross-ownership, like other forms of media concentration, must be given critical weight both in rulemaking and individual licensing proceedings. See, *e.g., Clarksburg Publishing Co.* v. *FCC*, 225 F. 2d 511 (D.C. Cir. 1955); *Scripps-Howard Radio, Inc.* v. *FCC*, 189 F. 2d 677 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 830; *Northeastern Indiana Broadcasting Co.*, 9 R.R. 261 and 318a (1953).

It is true that until the present proceeding the Commission never flatly prohibited future newspaper-broadcast cross-ownerships, let alone required divestiture. It justified its refusal to follow such a blanket diversification policy in the past by reliance on what it believed to be a compelling interest—that the then-new and not yet profitable broadcast industry could benefit substantially from the financial and journalistic resources of newspapers. Whatever the constitutional validity of that interest as a justification for departure from its general diversification policy, the Commission in the present proceeding quite properly found that it no longer may serve as such a justification.

> Now, unlike then, the broadcast medium has matured. While not all have made profits, for the most part it is the particular market situation or the newness of the operation that is the cause. Thus, the special reason for encouraging newspaper ownership, even at the cost of a

> lessened diversity, is no longer generally operative in the way it once was. Nor are newspapers the sole reservoir of experience on which reliance has to be placed. To the extent that TV (or radio) facilities are worth applying for, qualified and experienced applicants can be expected to step forward. Newspapers are not the only interested parties. The Commission is obliged to give recognition to the changes which have taken place and see to it that its rules adequately reflect the situation as it is, not was.

Second Report and Order, 50 F.C.C. 2d at 1074-1075 (App. 190-191). See also *First Report and Order*, 22 F.C.C. 2d at 312 (App. 45-46).

Nevertheless, the Commission relied upon the fact that it previously did not impose an absolute ban on newspaper-broadcast cross-ownerships as a reason for refusing to order divestiture in the absence of a showing that tangible harm would result from grandfathering. The Commission thereby reversed the mode of analysis it applied in promulgating its prospective rule, *i.e.*, that a departure from the diversification policy must be justified by a compelling government interest. Instead, the Commission demanded compelling justification in favor of divestiture, requiring a showing that "the need [for divestiture] is overwhelming and the evidence unambiguous." 50 F.C.C. 2d at 1083 (App. 207). Given the constitutional mandate of its diversification policy, the Commission's reversal of the burden of justification was impermissible.[13]

---

[13] The burden imposed by the Commission will be impossible to sustain as a practical matter. Former Commissioner Johnson has noted that the majority of media abuses remain undiscovered, due to the lack of written records and the fact that station managers rarely resort to overt documentable pressures. *In re National Broadcasting Co.*, 19 F.C.C. 2d 713, 720-723 (dissenting opinion). And Judge Tamm has explained that documentation of abuses

The mere fact that under divestiture former licensees will lose their license by itself hardly is a compelling interest justifying departure from the diversification policy. The Communications Act specifically states that a licensee has no interest in his license beyond the expiration date. 47 U.S.C. §§307(d), 309(h). Divestiture, in any event, would not work a forfeiture upon former licensees, who would be given sufficient opportunity to sell or trade their licenses, and who could apply for time waivers if necessary to protect against undue hardship.

Accordingly, the Commission must point to specific, articulable reasons of a compelling nature to justify a refusal to order divestiture. The reasons offered by the Commission simply failed to meet that burden, as the court of appeals opinion convincingly argues. *Amicus* relies upon the court's opinion on those questions, and leaves it to the respondent herein to argue them fully.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

ERIC M. LIEBERMAN
Rabinowitz Boudin & Standard
30 East 42nd Street
New York, New York 10017
Attorney for *Amicus Curiae*

December 1977

"would require not only program monitoring but also laborious perusal of reams of documentary evidence which will likely be dispersed, inaccessible and unintelligible to one who is not skilled in the intricacies of antitrust and communications law." *Hale* v. *FCC*, 425 F. 2d 556, 565 (D.C. Cir. 1970) (concurring opinion).